(1) Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

JOSE DANIEL RUIZ CORONADO,

Petitioner,

- against -

BANK ATLANTIC BANCORP, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(i) Can Congress tether the anomalous authority of a federal grand jury subpoena by requiring a bank to object to such a subpoena to protect the privacy of an account holder whose electronically-stored financial information the bank possesses – and hold the bank liable if they do not?

(ii) May summary judgment be granted based solely upon evidence received by the court *in camera* and *ex parte*?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Jose Daniel Ruiz Coronado, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 18, 2000.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is reprinted in the appendix hereto, *Appendix-2, infra*. The opinion of the Court of Appeals for the Eleventh Circuit is reprinted in the appendix hereto, *Appendix-11, infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §2702 - Disclosure of contents *Appendix-35*

18 U.S.C. §2703(a) – Contents of electronic communications in electronic storage *Appendix-38*

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STATEMENT OF THE CASE

Petitioner Jose Daniel Ruiz Coronado is a citizen of the Republic of Colombia and owned a bank account at Respondent BankAtlantic during the time frame in question.

Coronado opened this account with BankAtlantic on March 13, 1996. Following various account activity, on May 29, 1996, Coronado wire transferred $45,500 out of his account through BankAtlantic's connection to the Federal Reserve Bank's FedWire system.

On June 23, 1996, a civil seizure warrant was issued directing BankAtlantic to freeze the funds held in certain accounts, including Coronado's.

At some point during the 102 days between the opening of Coronado's account on March 13, 1996, and the seizure of his account on June 23, 1996, BankAtlantic received and responded to federal grand jury subpoenas. Included in BankAtlantic's responses to the subpoenas were Coronado's records detailing his bank account activity – including the May 29, 1996, wire transfer.

Subsequently, federal agents agreed to release 400 - 600 of these seized accounts – including Coronado's – as having no connection with money-laundering.

Coronado commenced this action by filing the complaint on September 27, 1996. The complaint alleged, among other grounds, that BankAtlantic was liable to Coronado for breaching its legal duties owed to him under the Electronic Communications Privacy Act, 18 U.S.C. §2701 *et seq.*

As conceded by BankAtlantic and the Eleventh Circuit (*Appendix-28, infra*), Coronado's financial information was protected from disclosure pursuant to a grand jury subpoena by the Electronic Communications Privacy Act as it was in BankAtlantic's electronic communication system for less than 180 days. 18 U.S.C. §§ 2702(b)(2), 2703(a).

During the course of proceedings in the district court, BankAtlantic submitted to the district court *in camera* and *ex parte* its afore-described responses to the federal grand jury subpoenas. Based solely upon this evidence, the district court

granted summary judgment holding that the affirmative defense of the Annuzio-Wylie Anti-Money Laundering Act, 31 U.S.C. §5318(g)(3), was a complete bar to Coronado's action.

On appeal, the Eleventh Circuit affirmed expressly holding that the Electronic Communications Privacy Act's §2703 was void by dint of Judicial superceding authority over federal grand jury practice and procedure. Significantly, the Eleventh Circuit refused to review the raised issue of granting summary judgment upon evidence received *ex parte* and *in camera*.

REASONS FOR GRANTING THE WRIT

The first reason for granting this writ is that Congress has specifically prohibited grand juries from accessing by subpoena information held in electronic storage for 180-days-or-less. Moreover, by that same act, Congress held a bank liable if it releases such information without a proper warrant. Implicitly, Congress requires that a bank challenge a grand jury subpoena which seeks such protected information or suffer the consequences if it doesn't.

The Eleventh Circuit in its holding below has specifically held that Congress cannot impose such a restriction and such an attempt by Congress is void as it is the Judiciary, not Congress, which determines the limits of a grand jury subpoena. Such a holding invalidates the Congressional scheme embodied – and explicitly approved by this Court – in the Electronic Communications Privacy Act and renders Congress powerless to tether the grand jury investigative function.

Second, it is axiomatic that Federal Rules of Civil

Procedure, due process and notions of fair play preclude the granting of summary judgment based upon evidence the plaintiff never sees and thus to which he can never respond.

As these issues raise questions vital to the administration of justice, the writ must be granted.

I. Congress Can Limit The Reach Of Grand Jury Subpoenas

The first issue is whether Congress can require third parties to challenge federal grand jury subpoenas – and hold them liable if they don't – which seek information Congress has mandated can only be obtained by a judicially-issued warrant.

A. The Electronic Communications Privacy Act's Limitations on the Scope of Grand Jury Subpoenas

This issue has been framed by the tension between two acts of Congress – The Electronic Communications Privacy Act found at 18 U.S.C. §2701 *et seq.* and the "safe harbor" provision of the Annuzio-Wylie Anti-Money Laundering Act found at 31 U.S.C. §5318(g)(3).

In the former, Congress expressly limited access to information held in electronic storage for 180-days-or-less to be by means of a judicially-issued warrant. 18 U.S.C. §2703(a).

See: Appendix-38. This Congressional intention is made even more certain as grand jury subpoenas are expressly permitted to access information held in electronic storage for more than 180 days under 18 U.S.C. §2703(b)(1)(B)(i). *See: Appendix-39.* Moreover, Congress imposed civil liability on the holders of such information for disclosure outside the access scheme contained in the Electronic Communications Privacy Act. 18 U.S.C. §2707. *See: Appendix-44.* Implicit in this disclosure scheme is that such holders of information have a duty to object to such prohibited subpoenas or suffer civil liability 18 U.S.C. §2707(a).

Raised solely by BankAtlantic against its conceded liability under the Electronic Communications Privacy Act's access scheme is the so-called third "safe harbor" provision of the Annunzio-Wylie Anti-Money Laundering Act. This provision provides immunity from civil liability for any financial institution which made a disclosure of financial information pursuant to "other authority". 31 U.S.C. §5318(g)(3). *See: Appendix-48.*

Correctly, the Eleventh Circuit has held in *Lopez v. First*

Union, 129 F.3d 1186 (11th Cir. 1997), that:

> The third safe harbor provision protects a financial institution's disclosure pursuant to "any other authority." 31 U.S.C. § 5318(g)(3). . . . The "other authority" must be legal authority, because authority means "right to exercise powers," *Black's Law Dictionary* 133 (6th Ed. 1991), and in our system based on rule of law, the right to exercise power is derived from law, e.g., statutes, regulations, court orders, etc. Hence, for a financial institution's disclosure to fall within the confines of the third safe harbor, the financial institution must be able to point to a statute, regulation, court order, or other source of law that specifically or impliedly authorized the disclosure. If it cannot do so, the disclosure is not entitled to the protection of the safe harbor.

Id. at 1193-1194.

Hence, the question is framed: Is a federal grand jury subpoena "other authority"? If it is, then BankAtlantic enjoys immunity under 31 U.S.C. §5318(g)(3) for its disclosure pursuant to federal grand jury subpoenas of Coronado's bank account information. However, if the grand jury subpoenas are not such "other authority" as they are <u>not</u> "legal authority", then BankAtlantic is liable for such disclosures.

In holding that grand jury subpoenas are "other authority" and that BankAtlantic has immunity from civil suit, the Eleventh Circuit held:

> The question here is not whether the government or the grand jury obtained evidence in violation of the [Electronic Communications Privacy Act], but whether BankAtlantic is liable to Coronado for its disclosure. BankAtlantic was subpoenaed merely as a witness, and long-standing grand jury policy and practice suggests that ***we do not want*** witnesses (who are not even targets of the grand jury) testing the limits of the grand jury's authority. (emphasis added).

Id. at *Appendix-27, infra*. This use of the judicial first person plural "we" thus succinctly focuses the pressing question: who determines the duties of witnesses in responding to a grand jury subpoena: Congress or the Judiciary?

If Congress, then the express warrant requirement for 180-day-or-less information contained in 18 U.S.C. §2703(a) must be respected and enforced. If the Judiciary – as the Eleventh Circuit held – then a district court has the ascendancy to strip Congress of its authority to limit a grand jury's investigation

by releasing a bank from any liability for responding to grand jury subpoenas seeking Congressionally protected information.

B. Congress – Not the Judiciary – Determines the Scope of Federal Grand Jury Investigative Powers

The initial recourse to determine which branch of government determines the limits upon grand jury investigative powers is the U.S. Constitution. There, the Fifth Amendment simply states that "No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury . . .". Tellingly, no other mention is made in the Constitution of the institution of the grand jury. As such, the Constitution is not instructive in this regard.

Nonetheless, the Judicial branch – through action of this Court – adopted rules for the operation of the federal grand jury. *See*: Rule 6, Federal Rules of Criminal Procedure. The original Federal Rules of Criminal Procedure were adopted by order of

this Court on December 26, 1944, transmitted to Congress by the Attorney General on January 3, 1945, and became effective on March 21, 1946.

Determinative of the instant question, these Rules of Criminal Procedure could not have become law without Congressional approval on March 21, 1946 and thereafter.

Indeed, at 28 U.S.C. §§2071, 2072 Congress expressly delegated to the Supreme Court the power to make rules – including Rule 6 related to federal grand juries – regarding the practice and procedures in the district courts. Noteworthy however, is that Congress limited such rules to "not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b).

Hence, under 18 U.S.C. 2703(a), Coronado has a "substantive right" to have his 180-day-old-or-less account records at BankAtlantic accessed only by judicially-issued warrant. As such, the Judicial branch is unauthorized to eliminate this right by rule of practice as the Eleventh Circuit attempted to here.

Accordingly, Congress (i) granted to this Court limited authority to enact the Rules but (ii) retained the authority to change these Rules and in fact has amended these Rules whenever it saw fit. *See:* for the most recent example: Public Law 104-132, Title II, Sec. 207(a). As the authority of this Court to make rules regarding federal grand juries is only by express grant of Congress, the Eleventh Circuit is sorely misplaced when it states that " ***we do not want*** witnesses . . . testing the limits of the grand jury's authority" as it is Congress – not the Judiciary – who determines who tests the limits of the grand jury's authority.

Here, Congress plainly – through enactment of the Electronic Communications Privacy Act – wanted the holders of this 180-day-or-less electronic information to challenge a grand jury's subpoena for the simple reason that no one else has the knowledge to so challenge. Coronado never timely knew of the grand jury subpoenas and hence would never have had the opportunity to challenge them.

This is why Congress made the policy decision in the Electronic Communications Privacy Act to require such a challenge by the only possible entity: the third-party holder of such information – here BankAtlantic. Indeed, telling of Congress' high level of concern for the protection of this precious information, is that even when grand jury subpoenas are authorized to access information held in electronic storage for more than 180 days, Congress required such access to be only after notice to the customer. 18 U.S.C. §2703(b)(1)(B)(i).

This Court enshrined a similar Congressional power in *Gelbard v. United States*, 408 U.S. 41; 92 S. Ct. 2357; 33 L. Ed. 2d 179 (1972). The central issue in *Gelbard* was whether 18 U.S.C. §2515 – "*Prohibition of use as evidence of intercepted wire or oral communications*" – could be used by a witness to resist testifying before a grand jury. Congress, through §2515, required that:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived

> therefrom may be received in evidence . . . before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter.

Hence, Congress prohibited what evidence the grand jury could subpoena and use by this section – illegally obtained oral or wire communications under the Electronic Communications Privacy Act. In discussing the importance of §2515 to the statutory scheme of the Electronic Communications Privacy Act, in the majority opinion, Justice Brennan stated:

> Section 2515 is thus central to the legislative scheme. Its importance as a protection for "the victim of an unlawful invasion of privacy" could not be more clear. The purposes of §2515 and Title III as a whole would be subverted were the plain command of §2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception.

Id. at 50-51. Plainly, not only does Congress have the power to limit what information may be obtained by a grand jury, this Court has expressly ratified this power – which the Eleventh Circuit below has now scrapped – in *Gelbard*. Furthermore, if Congress can empower a witness to resist grand jury questioning

on subjects it has determined are privileged from disclosure by a witness – illegally intercepted wire communications as in *Gelbard* – then it most certainly can extend that privilege to the agent of a witness – here BankAtlantic which possessed the Congressionally-protected information.

In sum, as grand jury subpoenas are not "legal authority" as they are expressly excluded by the Electronic Communications Privacy Act from accessing information in storage held for 180-days-or-less, then they cannot be "other authority" under the Annuzio-Wylie Anti-Money Laundering Act's third "safe harbor" provision. As such, a bank must resist such non-legal subpoenas or suffer the Congressionally-ordained consequences.

Accordingly, it is Congress – not the Judiciary – which determines the limits of grand jury subpoenas. As BankAtlantic ignored its obligation in this regard, it is liable to Coronado for the disclosures it made pursuant to the patently over-reaching grand jury subpoenas.

II. Summary Judgment Cannot Be Granted Upon Evidence Considered *Ex Parte* and *In Camera*

The district court received evidence *in camera* and *ex parte* and upon such evidence based its decision to grant summary judgment to BankAtlantic. The district court held:

> The Court has reviewed the grand jury subpoenas submitted *in camera* and finds that BankAtlantic made all disclosures of possible violations of money laundering and bank fraud laws pursuant to valid grand jury subpoenas.

Appendix-6, infra. The district court's conclusion determined that the affirmative defense of 31 U.S.C. §5318(g) is valid without an opportunity for Coronado to know or test this evidence. Such a procedure simply cannot comport with due process particularly in this case where Congress expressly gave Coronado the rights he sought to pursue under the Electronic Communications Privacy Act.

Indeed, under Rule 56(e), Federal Rules of Civil Procedure, the non-moving party, here Coronado, must come forward with facts showing there is a genuine issue for trial. How

can this be done when the particular facts presented by BankAtlantic are unknown to Coronado. *Accord*: *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Noteworthy, though this issue was expressly raised to the Eleventh Circuit by Coronado, it was relegated to an issue of discovery, not summary judgment, by the Eleventh Circuit and hence was ignored in their opinion. *See: Appendix-33, infra.*

Accordingly, the practice of *ex parte, in camera* determination of summary judgment can not be condoned by this Court declining review of this practice.

CONCLUSION

For the foregoing reasons and to secure the proper administration of justice, this Court must exercise its jurisdiction and grant this Petition.

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Opinions Below

Order Granting BankAtlantic's Motion for Summary Judgment of the United States District Court, Southern District of Florida, entered on May 24, 1999 . . . . . *Appendix-2*

Opinion of the United States Court of Appeals for the Eleventh Circuit, entered August 18, 2000 . . . . . *Appendix-11*

Constitutional Provisions, Statutes and Regulations Involved

18 U.S.C. §2702 - Disclosure of contents *Appendix-35*

18 U.S.C. §2703(a) – Contents of electronic communications in electronic storage *Appendix-38*

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31 U.S.C. § 5318(g)(3) - Liability for disclosures *Appendix-48*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 96-7115-C.V.-GONZALEZ

JOSE DANIEL RUIZ CORONADO

Plaintiff,

vs.

BANKATLANTIC BANCORP, INC.,

Defendant.

ORDER

THIS CAUSE has come before the Court upon BankAtlantic's Motion for Summary Judgment, filed June 24, 1998, Plaintiff's Motion for Summary Judgment, filed April 6, 1999, Plaintiff's Motion to Compel Response to Deposition, filed April 6, 1999, and Plaintiff's Motion to Reconsider or Alternatively Certify for Appeal the Court's Rulings on Plaintiff's Motions to Compel Discovery and Certify the Class, filed April 6, 1999.

HISTORY:

In June 1995, BankAtlantic discovered suspicious activity

in numerous accounts in BankAtlantic's international division. BankAtlantic reported the activity to the federal authorities. Eventually, a grand jury issued subpoenas for certain account records. BankAtlantic complied with the grand jury subpoenas. Plaintiff was one of the account holders under investigation and thereafter, filed this suit.

On January 22, 1997, this Court found that the Annunzio Wylie Anti-Money Laundering Act, Title 31 U.S.C. §5318(g) immunized BankAtlantic from liability for its disclosures and dismissed Plaintiff's complaint with prejudice. The Eleventh Circuit reversed this Court's Order of Dismissal holding that it was premature to dismiss the case based solely on the factual allegations in Coronado's complaint. *Lopez v. First Union National Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997), *reh'g denied* 141 F.3d 1191 (11th Cir. 1998).

The parties are now at the summary judgment stage of this action and the primary issue to be resolved is whether any of the safe harbor provisions of the Annunzio-Wylie Act immunize

BankAtlantic from liability.

STANDARD:

The Court may grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) . The Court should not grant summary judgment unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

The movant bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at

323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325.

After the movant has met its burden under Rule 56 (c), the burden of production shifts and the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). According to the plain language of Fed.R.Civ.P. 56(e), the non-moving party may not rest upon the mere allegations or denials of the adverse party's pleadings, but instead must come forward with specific facts showing that there is a genuine issue for trial, Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson*, 477 U.S. at 257. A mere scintilla of evidence supporting the opposing party's position will not suffice; there must be a sufficient

showing that the jury could reasonably find for that party. *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party is merely colorable, or is not significantly probative, then summary judgment may be granted. *Anderson*,477 U.S. 242, 249-50.

DISCUSSION:

BankAtlantic asserts that it provided the grand jury with access to account documents, records and financial information only pursuant to valid grand jury subpoenas. As a result, BankAtlantic contends that it is shielded by the third safe harbor provision of the Annunzio-Wylie Act.

In support of its argument, BankAtlantic submits the grand jury subpoenas for in camera review. The Court has reviewed the grand jury subpoenas submitted in camera and finds that BankAtlantic made all disclosures of possible violations of money laundering and bank fraud laws pursuant to valid grand jury subpoenas.

Notwithstanding the grand jury subpoenas, Plaintiff

contends that Defendant violated both the Electronic Communications Privacy Act, Title 18 U.S.C. §2510 et seq., and the Right to Financial Privacy Act, Title 12 U.S.C. §3401 et seq., by turning over account information to the grand jury. The Court disagrees.

The Annunzio-Wylie Act reads as follows:

> Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer, employee or agent of such institution, shall not be liable to any person under any law or regulation of the Untied States or any constitution, law, or regulation of any state or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure. 31 U.S.C. §5318(g) (3).

The third safe harbor provision of the Annunzio-Wylie Act provides immunity for disclosure of possible violations of laws pursuant to any other authority. The Eleventh Circuit, in its earlier decision in this case and consolidated case *Lopez* held that for a financial institution's disclosure to fall within the confines of the third safe harbor, the financial institution must be able to point

to a statute, regulation, court order or other source of law that specifically or impliedly authorized the disclosure. *Lopez* at 1193-94.

A grand jury is authorized to use subpoenas to compel the production of evidence. Without this tool, a grand jury would be unable to properly determine the matters before it.

Plaintiff's contention that a grand jury subpoena should not be considered legal authority within the meaning of the Annunzio-Wylie Act is untenable. The Founders of this country believed so strongly in the necessity of the grand jury that they provided for it in the Fifth Amendment of the United States Constitution. See *United States v. Calandra*, 414 U.S. 338, 343 (1974). Accordingly, the Court finds that a grand jury subpoena does fall within the purview of any other authority as provided in the Annunzio-Wylie Act.

Therefore, BankAtlantic is not liable to the Plaintiff under either the Electronic Communications Privacy Act or the Right to Financial Privacy Act because the Annunzio-Wylie Act states that

a financial institution - BankAtlantic - that makes a disclosure pursuant to any other authority - a grand jury subpoena - is not liable under any law of regulation of the United States.

The Court finds that a genuine issue of material fact does not exist in this case and summary judgment shall be granted in favor of BankAtlantic.

Having heard oral argument and having reviewed the motions, the record in this matter, and being otherwise duly advised, it is hereby:

ORDERED AND ADJUDGED as follows:

1. BankAtlantic's Motion for Summary Judgment is GRANTED. BankAtlantic shall file a proposed form of final judgment within twenty (20) days of the date of this Order.

2. Plaintiff's Motion for Summary Judgment is DENIED.

3. Plaintiff's Motion to Compel Response to Deposition is DENIED.

4. Plaintiff's Motion to Reconsider or Alternatively Certify

for Appeal the Court's Rulings on Plaintiff's Motions to Compel Discovery and Certify the Class is DENIED.

5. All other pending motions are DENIED as MOOT.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 24 day of May, 1999.

JOSE A. GONZALEZ, JR.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12108

D.C. Docket No. 96-07115-CV-JAG

JOSE DANIEL RUIZ CORONADO,

Plaintiff-Appellant,

versus

BANK ATLANTIC BANCORP, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida.

(August 18, 2000)

Before TJOFLAT, MARCUS and CUDAHY*, Circuit Judges.

CUDAHY, Circuit Judge:

BankAtlantic Bancorp, Inc. (BankAtlantic) responded to grand

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* Honorable Richard D. Cudahy, U.S. Circuit Judge for the Seventh Circuit sitting by designation.

jury subpoenas by producing the bank records of nearly 1100 international customers. Coronado, one of these customers purporting to represent a class including the others, filed this lawsuit against BankAtlantic for unlawful disclosure of financial information, claiming that BankAtlantic's disclosure violated federal and state law. BankAtlantic claimed immunity under the Annunzio-Wylie Anti-Money Laundering Act's (Annunzio-Wylie Act or Act) safe harbor provision, 31 U.S.C. §5318(g)(3), because their disclosure was made pursuant to the grand jury subpoenas. The district court initially granted BankAtlantic's motion to dismiss, but this court reversed and remanded. See *Lopez v. First Union Nat'l Bank of Florida*, 129 F.3d 1186, 1196 (11th Cir. 1997). On remand, the case proceeded to discovery, and Coronado filed several motions to compel disclosure of copies of the grand jury materials as well as information on BankAtlantic's internal operations. The district court denied these motions. BankAtlantic then moved for summary judgment, and the district court granted that motion. Coronado appeals.

I. Facts and Disposition Below

A. General Background

In February of 1995, BankAtlantic acquired MegaBank, a Dade County commercial bank, in order to create an international division. MegaBank's international division was headed by Piedad Ortiz, and after the acquisition, she became Vice President of BankAtlantic's international division. Ortiz had overseen approximately 1100 accounts at MegaBank, and she continued this supervision at BankAtlantic. Shortly after acquiring MegaBank, BankAtlantic conducted an internal audit of its new international division, and this audit revealed suspicious practices. A private pouch service made regular deliveries addressed to "BankAtlantic, International Division, Attention Ms. Piedad Ortiz." These pouches, which were uninsured, contained large amounts of checks, money orders and negotiable instruments along with deposit and transfer instructions. The pouches originated from a private courier service—discretely located in the back of another business—in Bogota, Columbia,

and the checks and other instruments transported in the pouches were from various locations in the United States, including New York and New Jersey. BankAtlantic discovered that Ortiz and her assistant, Lucia Ramirez (who had also joined BankAtlantic as part of the MegaBank acquisition), were responsible for initiating and maintaining this pouch service.

The BankAtlantic audit also revealed that Ortiz and her assistant were approving new accounts that were missing required customer identification documentation and allowing personal accounts to be used as unregistered money exchange facilities (in probable violation of Florida law). Further, BankAtlantic discovered, among other irregularities, that letters of authorization were missing for numerous wire transfers and that no currency transaction reports were filed when bearer instruments in excess of $10,000 arrived in the pouches from Bogota. There were millions of dollars flowing into and out of these Columbia-based accounts each month.

BankAtlantic became suspicious that its new international

division, as headed by Ortiz, was facilitating money laundering and bank fraud. BankAtlantic took these suspicions to federal law enforcement officials in June of 1995. At this point, the bank provided general information regarding its suspicions along with customer names and account numbers for only five accounts obviously connected with this questionable activity. BankAtlantic did not disclose the contents of any incoming or outgoing wire transfers at this time.

The federal government investigated this suspected money laundering and bank fraud, and sometime in the spring of 1996, three grand juries were impaneled. These grand juries—sitting in the Southern District of Florida, the Eastern District of New York and the District of New Jersey—investigated individuals and organizations in Florida, New York and New Jersey for the suspected laundering of Columbian drug money. In the late spring, the grand juries issued and served subpoenas on BankAtlantic demanding that it produce copies of account documents, records and information regarding the 1100 accounts

under the oversight of Ms. Ortiz in the international division.

The federal investigation was centered on these 1100 accounts that Ortiz had supervised at MegaBank and later at BankAtlantic, and on June 5, 1996, the United States Department of Justice, in conjunction with Columbian law enforcement agencies, announced the arrest of several individuals: Ortiz and Ramirez[1] were arrested upon suspicion that they were committing bank fraud to facilitate the illegal movement of funds by individuals in Columbia. Also on June 5, Judge Davis of the Southern District of Florida issued a ten-day ex parte temporary restraining order freezing the 1100 accounts in BankAtlantic's international division. On June 11, 1996, Judge Davis released the funds in some accounts, and then, on June 23, the district court issued a seizure warrant to freeze the remaining accounts until further court order. A supplemental order directed the Drug

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[1] On June 14, 1996, a federal grand jury indicted both Ortiz and Ramirez for making false entries in the books and records of BankAtlantic to keep the bank unaware of the currency transfer operation from Columbia.

Enforcement Agency (DEA) to physically seize all of the frozen funds (subject to certain exceptions not relevant here). Accordingly, BankAtlantic turned the funds over to the DEA on August 1, and on August 8, forfeiture proceedings were commenced against many of the accounts. About six months after the initial seizure, the government agreed to release between 400 and 600 of the accounts—there is no evidence in the record suggesting why—and the funds were returned to these account holders with full interest in December of 1996.

B. Coronado's Account and Lawsuit

Coronado opened his account with BankAtlantic on May 13, 1996 – almost a year after BankAtlantic first reported suspicious activity to the federal government and, as it turned out, about three weeks before Ortiz's arrest. Ortiz had opened the account for Coronado using instruments drawn on United States's banks that had been shipped from Bogota, Columbia, to Miami via the private courier service. Coronado's initial deposit consisted of four checks in odd amounts that totaled exactly

$5000 in value, and subsequent deposits were comprised of checks, travelers' checks and money orders drawn on banks in New York and New Jersey. Once the amount Coronado had on deposit grew to a little less then $46,000, $45,500 was wire transferred to a Swiss bank account. The day after the transfer, new deposits began. BankAtlantic had not mentioned Coronado in its initial disclosure to federal authorities in 1995 (recall, he did not open his account until 1996), but Coronado's account information and the records of the wire transfer to Switzerland were turned over to the grand jury pursuant to the 1996 subpoenas. On June 5, 1996, Coronado's account was frozen along with the other 1100 that Ortiz had supervised, but his account was not among those released on June 11. Instead, his funds were seized pursuant to the district court orders, and forfeiture proceedings were commenced against Coronado's account on August 8. His account was eventually released, along with the 400 to 600 others, pursuant to the agreement with the government, and his funds were returned (with interest) before

the end of 1996.

Months earlier, on September 30, 1996, Coronado had filed this lawsuit against BankAtlantic, purportedly representing a class consisting of himself and the other 1100 holders of accounts in BankAtlantic's international division. In his complaint, Coronado alleged that BankAtlantic violated the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510 et seq., the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 et seq., and Florida law by disclosing account information and records to the grand juries. Before class certification, BankAtlantic moved to dismiss Coronado's complaint under Federal Rule of Civil Procedure 12(b)(6), and the district court granted that motion, dismissing Coronado's complaint with prejudice exclusively on the ground that BankAtlantic was immune from suit under the Annunzio-Wylie Act's safe harbor provision, 31 U.S.C. § 5318(g)(3). On appeal, this court reversed and remanded because the allegations in Coronado's complaint, taken in the light most favorable to

Coronado, did not establish grounds for BankAtlantic's immunity. See *Lopez*, 129 F.3d at 1194-96. On remand, the case proceeded through a few months of discovery, with Coronado making motions to compel BankAtlantic's production of copies of the grand jury subpoenas and documents turned over to the grand juries as well as to compel production of other BankAtlantic information. The district court denied all these motions, and in June of 1998, BankAtlantic moved for summary judgment. The district court granted BankAtlantic's motion, again on the ground that the bank was shielded by the safe harbor provisions of the Annunzio-Wylie Act. Coronado again appeals.

II. Discussion

In his brief on appeal, Coronado identifies three issues we must decide: (1) whether the Annunzio-Wylie Act provides BankAtlantic with immunity from his claims under federal and state law; (2) whether Coronado was entitled to partial summary judgment that BankAtlantic had violated the RFPA and the ECPA; and (3) whether the district court erred in denying

Coronado's motions to compel discovery. We review the first two issues de novo, see *Ross v. Clayton County, Ga.*, 173 F.3d 1305, 1307 (11th Cir. 1999), and review the discovery issue for abuse of discretion, see *Leigh v. Warner Brothers, Inc.*, No. 99-10087, 2000WL 679162, at 7 (11th Cir. May 25, 2000).

A. Immunity Under the Annunzio-Wylie Act

In 1992, Congress enacted the Annunzio-Wylie Anti-Money Laundering Act in order to facilitate cooperation between domestic financial institutions and the United States government to stop the global movement of drug money. Large criminal enterprises depend on their ability to conceal the proceeds of their criminal endeavors, and the Annunzio-Wylie Act seeks to make concealment much more difficult by encouraging financial institutions to disclose suspicious activity and cooperate with law enforcement efforts. But, because disclosure of financial information – either spontaneously or after a request from the government – could possibly lead to litigation with disgruntled customers like Coronado, the Annunzio-Wylie Act granted

immunity to banks making disclosures. The safe-harbor provision, to this end, reads in its entirety as follows:

> Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution, shall not be liable to any person under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

31 U.S.C. §5318(g)(3). The plain language of this section supplies "an affirmative defense to claims against a financial institution for disclosing an individual's financial records or account-related activity." *Lopez*, 129 F.3d at 1191. Few courts have had the opportunity to examine this section in detail, but we recently explained in *Lopez* that § 5318(g)(3) grants to financial institutions "immunity from liability for three different types of disclosures: (i.) A disclosure of any possible violation of law or regulation, (ii.) A disclosure pursuant to § 5318(g) itself, or (iii.) A disclosure pursuant to any other authority." *Id.* These safe

harbors are not limited to currency transactions, and any one of them provides a disclosing bank complete immunity. See *id.* at 1192.

BankAtlantic claims, and Coronado does not dispute, that the grand jury subpoenas it received were facially valid and properly served. BankAtlantic argues, quite simply, that because it only disclosed information pursuant to these subpoenas, it disclosed information in accordance with "other authority" and has immunity under the Annunzio-Wylie Act's safe harbor (iii). In *Lopez*, we explained § 5318(g)(3)'s third safe harbor and the meaning of "any other authority" as follows:

> The "other authority" must be legal authority, because authority means "[r]ight to exercise powers," Black's Law Dictionary 133 (6th ed. 1991), and in our system based on rule of law, the right to exercise power is derived from law, e.g. statutes, regulations, court orders, etc. Hence, for a financial institution's disclosure to fall within the confines of the third safe harbor, the financial institution must be able to point to a statute, regulation, court order, or other source of law that specifically or impliedly authorized the disclosure. If it cannot do so, the disclosure is not entitled to the protection of the [third] safe

harbor.

Lopez, 129 F.3d at 1193-94. In *Lopez*, by way of example, we explained that "[c]learly a disclosure in response to a seizure warrant is protected by the third safe harbor." *Id.* at 1194. However, we also explained that a government agent's "verbal request" for information is not "other authority" because there is no "statute or regulation which gives a government official's verbal request to access an individual's financial records the force of law." *Id.* *Lopez* did not explicitly address grand jury subpoenas, but we believe that these are properly considered "other authority" for the purposes of § 5318(g)(3).

A federal grand jury has extremely broad investigatory powers and, unlike a federal agent making a verbal request, "may compel the production of evidence or the testimony of witnesses as it considers appropriate." *United States v. Calandra*, 414 U.S. 338, 343 (1974). A grand jury has the power to compel the production of evidence because "a federal grand jury subpoena is issued under the authority of a court." *Doe v. DiGenova*, 779

F.2d 74, 80 (D.C. Cir. 1985). More specifically: under Federal Rule of Criminal Procedure 17(a), the clerk of a district court is authorized to issue blank subpoenas (marked with the seal of the court) to a prosecutor working with a grand jury. See *DiGenova*, 779 F.2d 80 n.12. If a recipient of a grand jury subpoena does not produce the evidence sought, the recipient that disobeyed the subpoena (which is essentially an order of the court), is in contempt, see 28 U.S.C. § 1826; Fed. R. Crim. P. 17(g), and may be fined or imprisoned, see 28 U.S.C. § 1826. Thus, unlike, for example, a mere verbal request from a government agent, there is a legal mechanism to enforce grand jury subpoenas. They possess the "force of law" because they are issued under the authority of a federal district court, and disobedience can lead to a legal sanction. See generally *Calandra*, 414 U.S. at 345 ("The power of a federal court to compel persons to appear and testify before a grand jury is . . . firmly established.").

But Coronado is quick to point out that the reach of grand jury subpoenas is not unlimited: a federal district court has the

power to quash a grand jury subpoena requesting documents "if compliance would be unreasonable or oppressive," see Fed. R. Crim. P. 17(c), and a grand jury "may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Calandra*, 441 U.S. at 346. Also, Congress has the power to limit grand jury subpoenas by enacting statutes, see *Gelbard v. United States*, 408 U.S. 41, 52 (1972) (holding that, under 18 U.S.C. § 2515, a witness called before a grand jury can refuse to answer questions based on information obtained in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968). Coronado argues that the account records demanded in the grand jury subpoenas here were "privileged" under the ECPA and therefore outside the reach of the grand jury. His argument is, essentially, that because § 2703(a) of the ECPA states that "[a] governmental entity may require the disclosure . . . of the contents of an electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant under

the Federal Rules of Criminal Procedure," and because grand jury subpoenas are not warrants, the grand juries lacked the power to compel production of his account information. Therefore, BankAtlantic's disclosure pursuant to a grand jury subpoena violated this provision of the ECPA, and it cannot use the shelter of the Annunzio-Wylie Act's safe harbor, Coronado concludes.

Coronado's argument begs the question. The question here is not whether the government or the grand jury obtained evidence in violation of the ECPA, but whether BankAtlantic is liable to Coronado for its disclosure. BankAtlantic was subpoenaed merely as a witness, and long-standing grand jury policy and practice suggests that we do not want witnesses (who are not even targets of the grand jury) testing the limits of the grand jury's authority. The Supreme Court has emphasized that "a witness may not interfere with the course of the grand jury's inquiry." *Calandra*, 414 U.S. at 345. Further, as a witness, BankAtlantic was "not entitled to urge objections of incompetency or irrelevancy, such as a party might raise," *id.*, nor

was BankAtlantic entitled "to challenge the authority of the court or of the grand jury, provided they have a de facto existence and organization." *Blair v. United States*, 250 U.S. 273, 282 (1919) (holding that witnesses could not refuse to testify or produce documents on the ground that the relevant criminal statute was unconstitutional). See also *Calandra*, 414 U.S. at 345. "[A witness] is not entitled to set limits to the investigation that the grand jury may conduct." *Blair*, 250 U.S. at 282. Thus, even if the ECPA technically deprived the grand jury of the authority to demand the account records from BankAtlantic, BankAtlantic – as a witness – was not in a position to test the limits of the grand jury's authority. BankAtlantic was presented with facially valid subpoenas from three federal grand juries investigating money laundering. Forcing a bank to challenge a facially valid grand jury subpoena in order to avoid liability to one (or more) of its customers would fly in the face of both the Annunzio-Wylie Act's clear intent to encourage cooperation with money laundering investigations and the more general policy favoring the "effective

and expeditious discharge of the grand jur[ies'] duties." *Calandra*, 414 U.S. at 349-50. We believe it proper to label grand jury subpoenas, like search warrants or court orders, "legal authority" under Lopez, and we find that a grand jury subpoena qualifies as "other authority" under the Annunzio-Wylie Act's third safe harbor. BankAtlantic's disclosure, therefore, is covered by the third safe harbor.

Having determined that BankAtlantic is protected by §5318(g)(3)'s third safe harbor, it remains only to determine the scope of the immunity granted by the statute. This is a straight-forward determination. Section 5318(g)(3) states that a qualified bank "shall not be liable to any person under any law or regulation of the United States or any constitution, law, or regulation of any State." 31 U.S.C. § 5318(g)(3) (emphasis added). This immunity is very broad.[2] As we recently reiterated

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[2] There is no official legislative history for the Annunzio-Wylie Act, but in a letter written after the passage of the Act, Chairman of the House Subcommittee on Financial Institutions, and sponsor of the Act, Congressman Frank Annunzio explained in a letter

in *Lopez*, "the adjective 'any' is not ambiguous; it has a well-established meaning" and, "[r]ead naturally, . . . has an expansive meaning, that is, one or some indiscriminately of whatever kind." 129 F.3d at 1192 (citations omitted). "Any person" certainly includes Coronado, and "any law or regulation" includes the ECPA, the RFPA and Florida law. (In fact, § 5318(g)(3) immunizes BankAtlantic from suit under every source of law except the United States Constitution.) Because BankAtlantic disclosed Coronado's account records and information pursuant to facially valid grand jury subpoenas, BankAtlantic is immune from any lawsuit arising from these disclosures.[3] Therefore, the district court properly granted BankAtlantic's motion for summary judgment.

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that the immunity provisions of the Act sought "to provide the broadest possible exemption from civil liability for the reporting of suspicious transactions. . . ." Cong. Rec. E57-02 (1993).

[3] Our determination that BankAtlantic is immune under the Annunzio-Wylie Act eliminates any need to address Coronado's second argument on appeal (that he is entitled to summary judgment on his ECPA and RFPA claims).

B. Discovery

In his remaining argument, Coronado contends that the district court improperly denied his motions to compel discovery because the denials inhibited his ability to defend against BankAtlantic's motion for summary judgment. Specifically, Coronado contends that BankAtlantic should have been compelled to (1) provide him with copies of the bank's FedWire Funds Transfer System contracts, (2) provide copies of all documents describing the bank's computer accounting system, (3) provide copies of the grand jury subpoenas and documents produced to the grand juries and (4) allow Coronado to depose Frank Greico, a member of BankAtlantic's upper management, about the contents of the grand jury subpoenas and documents produced. Coronado cites little if any legal authority for the allegedly "required" disclosure of any of these materials. Despite his protestations, we find that the district court did not abuse its discretion by denying these motions.

As Coronado concedes in his brief, the FedWire contracts

and information on BankAtlantic's computer system were only relevant to establishing his claim under the ECPA. But, given that BankAtlantic is immune under the Annunzio-Wylie Act, Coronado's claim under the ECPA is not viable. Hence, any possible abuse of discretion in denying Coronado's motion to compel production of this information was harmless. See *Dykes v. Depuy*, Inc., 140 F.3d 31, 42 (1st Cir. 1998).

Coronado's other two motions to compel sought production of grand jury materials. Coronado claims that he wanted access to these materials to determine whether BankAtlantic really complied with the subpoenas as it claims. BankAtlantic could not turn over the documents, nor could Mr. Greico answer deposition questions about the grand jury, because it is illegal for them to do so. See 18 U.S.C. § 1510(b)(2) (making it a crime for a bank to directly or indirectly notify a customer of the contents of a grand jury subpoena or information furnished to a grand jury pursuant to a subpoena). The only way Coronado could have obtained grand jury materials was through

a court order pursuant to Federal Rule of Criminal Procedure 6(e)(3)(C)(i), but he never sought such an order. Even if he had, a district court has "substantial discretion" in balancing the need for disclosure with the need for grand jury secrecy. *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979).

Here, Coronado's need for disclosure was tied to his desire to verify BankAtlantic's strict compliance with the subpoenas. Frank Greico and a government investigator each filed an affidavit stating that the information submitted by BankAtlantic was limited to that which was responsive to the subpoenas, and the district court gave Coronado an opportunity to depose both on their affidavits before it granted summary judgment. Additionally, to verify for itself the accuracy of the affidavits, the district court reviewed the subpoenas and the documents provided to the grand juries in camera. We believe this procedure appropriately balanced the need for grand jury secrecy with Coronado's needs as a litigant. See *Young v. United*

States, 406 F.2d 960, 961 (D.C. Cir. 1969) (noting that an in camera inspection is the proper way to maintain the secrecy of grand jury proceedings and meet the needs of litigation). Therefore, the district court did not abuse its discretion by denying Coronado's motion to compel production of the grand jury materials.

III. Conclusion

For the foregoing reasons, we reject Coronado's arguments on appeal and AFFIRM the judgment of the district court.

18 U.S.C. §2702 - Disclosure of contents

(a) **Prohibitions**. Except as provided in subsection (b)--

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service--

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such

communications for purposes of providing any services other than storage or computer processing.

(b) **Exceptions.** A person or entity may divulge the contents of a communication--

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service; or

(6) to a law enforcement agency, if such contents--

(A) were inadvertently obtained by the service provider; and

(B) appear to pertain to the commission of a crime.

18 U.S.C. §2703 Requirements for governmental access

(a) **Contents of electronic communications in electronic storage**. A governmental entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminall Procedure or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of an electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) **Contents of electronic communications in a remote computing service.**

(1) A governmental entity may require a provider of

remote computing service to disclose the contents of any electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection--

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity--

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any electronic communication that is held or maintained on that

service –

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) **Records concerning electronic communication service or remote computing service**.

(1) (A) Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service may disclose a record or other information pertaining to a subscriber to or customer of such service (not

including the contents of communications covered by subsection (a) or (b) of this section) to any person other than a governmental entity.

(B) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity only when the governmental entity –

(i) obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant;

(ii) obtains a court order for such disclosure under subsection (d) of this section; or

(iii) has the consent of the subscriber or customer to such disclosure.

(C) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the name, address, telephone toll billing

records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of such service and the types of services the subscriber or customer utilized, when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under subparagraph (B).

(2) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) **Requirements for court order**. A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction described in section 3126(2)(A) and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and

material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) **No cause of action against a provider disclosing information under this chapter** [18 USCS @@ 2701 et seq.]. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter [18 USCS @@ 2701 et seq.].

18 U.S.C. §2707 - Civil action

(a) **Cause of action**. Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or customer aggrieved by any violation of this chapter [18 USCS §§2701 et seq.] in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) **Relief**. In a civil action under this section, appropriate relief includes--

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) **Damages.** The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the

plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $ 1,000.

(d) **Defense.** A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of; is a complete defense to any civil or criminal action brought under this chapter [18 USCS §§2701 et seq.] or any other law.

(e) **Limitation**. A civil action under this section may not be commenced later than two years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

28 U.S.C. §2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c) (1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

28 U.S.C. §2072 - Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before

magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

31 U.S.C. § 5318(g)(3) Liability for disclosures

Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution, shall not be liable to any person under any law or regulation of the United States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

(2)

No. 00-561

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSE DANIEL RUIZ CORONADO,

Petitioner,

v.

BANKATLANTIC BANCORP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

There is really only one question in this case: Whether the Annunzio-Wylie Anti-Money Laundering Act (31 U.S.C. § 5318(g)(3)) ("the Annunzio Act") immunizes BankAtlantic from civil liability to Coronado for providing some of his account information to federal law enforcement authorities when none of Coronado's account information was provided to the federal officials except pursuant to grand jury subpoenas issued in the course of a criminal money laundering and bank fraud investigation, of which the bank was not a target.

Coronado attempts to break this single question into two sub-questions by (incorrectly) arguing (1) that grand jury subpoenas do not constitute "any other authority" within the meaning of the Annunzio Act, thus precluding immunity, because the statutory basis of his complaint, i.e., the Electronic Communications Privacy Act (ECPA), does not recognize grand jury subpoenas as a valid basis for producing Coronado's account records to law enforcement officials in this case (thereby ignoring the more recent and more specific pronouncements by Congress in the Annunzio Act as well as express language in the ECPA recognizing the authority of grand jury subpoenas) and (2) that the immunity provisions of the Annunzio Act cannot be given effect unless Coronado himself can examine all of the secret grand jury records (despite the existence of other evidence, and the opportunity he was given to depose the witnesses, proving that Coronado's account records were provided to the government *only* pursuant to valid grand jury subpoenas).

RULE 29.6 STATEMENT

BankAtlantic Bancorp, Inc. is the parent of BankAtlantic, a Federal Savings Bank, the entity in which Coronado had his account. (Coronado sued the wrong entity, i.e., the bank holding company rather than the bank itself, which was brought to the attention of the lower courts.) To the best of our knowledge, the only publicly held company that owns 10% or more of BankAtlantic Bancorp's stock is BFC Financial Corporation, which owns 100% of Class B common stock and about 26% of the Class A common stock.

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STATEMENT OF THE CASE

There are four egregious misstatements in Coronado's statement of the case. First, federal agents did *not* release Coronado's funds "as having no connection with money-laundering." Second, neither BankAtlantic nor the Eleventh Circuit ever "conceded" that Coronado's financial information was protected from disclosure pursuant to a grand jury subpoena by the ECPA. Third, the trial court's decision was not based "solely" on the evidence submitted to it *in camera*. Fourth, the Eleventh Circuit did not hold a provision of the ECPA void by virtue of judicial control over grand jury practice and procedure, ruling instead that Congress itself, in the Annunzio Act, established that acting in compliance with a grand jury subpoena is a sufficient basis to provide banks immunity from civil liability claims of customers for providing account records to federal law enforcement authorities.

In addition, Coronado's statement seriously understates the nature of the events leading up to the disclosures by BankAtlantic pursuant to the grand jury subpoenas. The full history of this case demonstrates the wisdom of Congress when providing banks immunity in the Annunzio Act from civil liability under *"any* law" (including the ECPA) for disclosures made pursuant to *"any* other authority" (such as grand jury subpoenas). A more complete statement of the facts follows.

1. BankAtlantic Acquires MegaBank

In February of 1995, BankAtlantic acquired the operations of MegaBank, a Dade County commercial bank. MegaBank had an international division headed by

Piedad Ortiz. BankAtlantic did not have an international division prior to its acquisition of MegaBank. BankAtlantic employees, therefore, sought to understand how the international division functioned and began to review its operations.

2. BankAtlantic Discovers Suspicious Activities At The Former MegaBank International Division

Shortly after the acquisition of MegaBank, BankAtlantic conducted an audit of the newly acquired facilities, including the international division. It discovered certain banking practices in that division which appeared to be suspicious and strongly suggested the possibility of money laundering activities and bank fraud. For example, BankAtlantic discovered that a private courier service was making regular deliveries to the division of a pouch containing unusually large amounts of checks, money orders, and negotiable instruments in bearer and restrictive endorsement form, along with deposit and transfer instructions, primarily from customers in Cali and Bogota, Colombia, all without any insurance on the contents of the pouch.

The pouches originated at an "office" in Bogota that purportedly provided only courier services for international bank customers, that was located in the back of another business, and that had no identifying signs as a bank. Among the items in the pouches were checks and other instruments from various locations in the United States that were being returned from Colombia for deposit. A great many of the items originated in New York or New Jersey.

The courier pouches were addressed to BankAtlantic, International Division, Attention Ms. Piedad Ortiz. Ms. Ortiz was an officer of MegaBank until the date of the merger of MegaBank into BankAtlantic. Subsequently, upon completion of the merger, she became the Vice President of the International Banking Division that BankAtlantic acquired from MegaBank in the merger. She had oversight of all the approximately 1,100 accounts in the former MegaBank international office. BankAtlantic was particularly concerned about the suspicious activity of Ms. Ortiz and her assistant Lucia Ramirez – Assistant Vice President, International Banking, who was the second ranking official in the International Division – regarding the pouches and the accounts they oversaw.

BankAtlantic discovered that Ms. Ortiz and her assistant were responsible for initiating and maintaining the courier pouch service. The courier service was run by one of Ms. Ortiz's account customers. BankAtlantic also discovered that Ms. Ortiz and her assistant were initiating or approving the opening of numerous accounts that were missing required customer identification documentation as well as allowing purportedly personal accounts to be used as unregistered and unlicensed money exchange facilities in apparent violation of Florida law. In addition, BankAtlantic discovered, among other things, that letters of authorization were not on file to cover a number of large monetary wire transfers, that documentation did not exist to explain multiple endorsements on checks from the pouches being deposited in BankAtlantic accounts, that deposits were made of third party checks not endorsed by the payees and of money orders missing

the names of the payees without any supporting documentation for the deposits, that negotiable instruments in bearer form in excess of $10,000 arriving in the pouches were being accepted without the filing of currency transaction reports, and that there was a large scale movement of funds in the millions of dollars in and out of Colombian based accounts. BankAtlantic determined that the total account balances in the International Division ranged between $18 million and $25 million per month.

3. BankAtlantic Discloses The Suspicious Activity To Federal Authorities

BankAtlantic brought those suspicious activities to the attention of federal law enforcement personnel. In the course of reporting the suspicious activity to the federal authorities, BankAtlantic did not disclose any account documents, records, or data. The bank provided federal agents with only general information regarding its suspicions and the names and account numbers for five accounts directly and immediately connected with the suspicious activities. None of Coronado's account information was included in this disclosure.

Moreover, at no time were the contents of any incoming or outgoing wire transfers ever disclosed to the government while in transmission or while in electronic storage. The government never requested the bank, nor did the bank ever volunteer, to allow interception of any incoming or outgoing wire transfers for any account at the bank, specifically including Coronado's account. Additionally, at all times prior to the seizure of the funds in Coronado's account, BankAtlantic had no ability to

electronically store, and, thus, did not store electronically for any time period, the information regarding either incoming or outgoing wire transfers in any account. Incoming wire transfers simply resulted in a printout of the information on a printer at the bank and never went directly into any form of electronic storage. Information for outgoing wire transfers was first prepared on paper forms and then typed onto computer screens and transmitted. As a matter of undisputed fact, none of the information regarding either the incoming or the outgoing wire transfers was, or even could be, stored electronically by the bank within the meaning of the ECPA.

4. Criminal Investigations By Grand Juries And Arrests By The Federal Government

The first time any account documents, records, or information regarding any of the approximately 1,100 accounts in the international division under the oversight of Ms. Ortiz at BankAtlantic were obtained by the federal government was pursuant to properly issued and served grand jury subpoenas pursuant to a criminal investigation of money laundering and bank fraud. All of the other documents, records, and information subsequently obtained from BankAtlantic by the federal government regarding those accounts were also pursuant to properly issued and served grand jury subpoenas as part of the criminal investigation.

BankAtlantic received the grand jury subpoenas from the Southern District of Florida, the Eastern District of New York, and the District of New Jersey. BankAtlantic was advised from the outset that the government and the

grand juries were investigating a network of individuals and organizations in New York, New Jersey, Florida, and elsewhere that were allegedly laundering money for Colombian drug organizations in violation of criminal laws.

On June 5, 1996, the U.S. Department of Justice, in conjunction with Colombian law enforcement officials, announced the arrests of several individuals arising out of the investigation labeled by the government as "OPERACION BANCARIAS." The arrests included former MegaBank officers, Piedad Ortiz, and her assistant, Lucia Ramirez. The government alleged that the bank officers were committing bank fraud to facilitate the movement of funds by individuals in Colombia. The investigation specifically included the 1,100 foreign accounts at the former MegaBank international office, the majority of which were opened in Colombia. On June 14, 1996, a Federal grand jury indicted Ms. Ortiz and Ms. Ramirez for making false entries in the books and records of BankAtlantic to keep the bank unaware of a currency transfer operation from Colombia.

5. The Activity In Coronado's Account

Coronado opened his account on May 13, 1996, only a short time before the arrest of Piedad Ortiz and others alleged to be involved in a money laundering operation. The account was opened by Ms. Ortiz. The opening deposits in this account, all of which were financial instruments drawn on United States financial institutions, were shipped from Bogota, Colombia, to Miami via the courier service arranged by Piedad Ortiz. The deposit with which the account was opened consisted of four

checks in odd amounts that totaled precisely $5,000. None of those checks have names or addresses printed on them; except for the account number, they are anonymous because the signatures are completely illegible. Two of those checks, drawn on the same account, are in check number sequence.

Subsequent deposits included checks, traveler's checks, and money orders from individuals in New York and New Jersey. The initial account balance of $5,000 was supplemented until it reached just a little under $46,000. At that point, $45,500 was wire transferred to a Swiss bank account. One day later, new deposits began. These new funds were seized before they could be transferred out of the account.

6. Freezing And Seizure Of The Accounts At BankAtlantic Pursuant To Court Orders

On June 5, 1996, in addition to the arrests of Piedad Ortiz, Lucia Ramirez and others, and in addition to the execution of search warrants, federal agents obtained from Judge Edward Davis of the Southern District of Florida a ten day ex-parte temporary restraining order against the 1,100 accounts in the international division at BankAtlantic, which included Coronado's account. On June 11, 1996, Judge Davis entered an order modifying the TRO by releasing the freeze on sums held in certain accounts, which did not include Coronado's account. On June 13, 1996, the district court entered a second order modifying the TRO by extending the operation of the order for ten days against the accounts that were not released.

On June 23, 1996, the district court issued a seizure warrant under Rule 41 of the Federal Rules of Criminal Procedure directing any agent of the Drug Enforcement Administration to serve BankAtlantic with the warrant and to freeze the funds held in certain specified accounts. The seizure warrant directed any authorized senior bank official of BankAtlantic or the bank's duly authorized legal counsel to take all steps necessary to insure that the accounts and the funds contained therein were immediately frozen until further order of the court and to provide the officer serving the warrant with a written statement as to the sums on deposit in the designated accounts. Coronado's account was one of many accounts frozen pursuant to the seizure warrant.

On June 28, 1996, the district court entered a Supplemental Order On Seizure Warrant. The supplemental order directed the DEA to physically seize the funds which had been frozen by the original seizure warrant, with the exception of certain accounts described in the exceptions list attached to the supplemental order. Coronado's account was not on the exceptions list. On or about July 1, 1996, pursuant to the supplemental order, BankAtlantic complied with the order and turned the funds over to the DEA. On or about August 8, 1996, an administrative forfeiture proceeding was commenced against Coronado's account, among others, as required by the supplemental order. At no time were any funds turned over to the Government except pursuant to the seizure warrant and accompanying court orders.

7. Freezing And Seizure Orders From Federal Courts In New York And Puerto Rico

In addition to the seizure warrants issued by the Southern District of Florida, BankAtlantic received verified complaints in rem and warrants for arrests in rem from the United States District Court for the Eastern District of New York and the District of Puerto Rico.

In the Eastern District of New York action, the government alleged that during the time period March 28, 1995, to October 27, 1995, a total of 1,128 postal service money orders in the aggregate amount of $731,910 had been purchased in a structured manner from 146 separate postal service facilities primarily in New York, New Jersey, and Miami. The money orders were then deposited into various financial institutions (including, but not limited to BankAtlantic), to evade the currency reporting requirements of 31 U.S.C. § 5313. BankAtlantic froze a total of $260,499.61, pursuant to the warrant of arrests issued from New York.

In the District of Puerto Rico action, the government sought forfeiture of money deposited in various banks including BankAtlantic during the time period March 24, 1995, to July 19, 1995. The government alleged that between April 1993 and July 1995, approximately $20 million in U.S. currency was delivered to undercover agents of the FBI and then wire-transferred to bank accounts around the world pursuant to instructions given by a Cali drug money laundering group. The government sought forfeiture of the funds transferred to four accounts at BankAtlantic. On or about July 1, 1996, BankAtlantic advised the U.S. Attorney for the District of

Puerto Rico that all funds had already been turned over to the government in Florida.

8. Release Of Coronado's Funds

About six months after its seizure of the funds, the federal government apparently agreed to release approximately 400-600 of the seized accounts. There is no evidence in the record of this case to establish why the federal government decided to release any of the accounts. The assertion in Coronado's brief that the accounts were ultimately released as having nothing to do with money laundering is nothing more than an iteration of the same conclusory allegation contained in his complaint. Coronado admits, however, that in December 1996, the entire sum in his account was returned in full with interest pursuant to an agreement reached with the federal government. That agreement precluded suit against the federal government but neglected to include BankAtlantic.

9. Coronado Files Suit

Coronado filed suit against BankAtlantic as a purported class action on behalf of all the customers whose accounts had been seized by the federal government. He sought unspecified money damages and attorney's fees. The district court initially dismissed Coronado's complaint with prejudice on the ground that the Annunzio Act immunized BankAtlantic from civil liability for its disclosures to federal authorities of suspected criminal

activity, i.e., money laundering and bank fraud. The Eleventh Circuit reversed, acknowledging that the Annunzio Act grants banks broad immunity under at least three safe harbor provisions, but holding that it was premature to dismiss the case based solely upon the factual allegations of Coronado's complaint. *Lopez v. First Union National Bank of Florida*, 129 F.3d 1186 (11th Cir. 1997), *reh'g denied*, 141 F.3d 1191 (11th Cir. 1998).

In light of the opinion of the Eleventh Circuit, BankAtlantic filed a motion for summary judgment and brought before the district court all of the indisputable, material facts establishing that the bank is entitled to the immunity afforded by the Annunzio Act. Most particularly, the bank submitted an affidavit of the Senior Special Agent of the United States Custom Service responsible for the criminal investigation in Miami along with an affidavit of the Senior Executive Vice-President of BankAtlantic responsible for the bank's compliance with the demands of the grand jury. Both individuals unequivocally swore under oath that at no time did BankAtlantic provide federal agents with access to, or in any way disclose, any account documents, records, or financial information for Coronado's account, or any of the approximately 1,100 other accounts alleged in the complaint by Coronado, except in strict compliance with, and within the scope of, valid and properly served grand jury subpoenas issued pursuant to criminal investigations of money laundering and bank fraud. Coronado was given an opportunity to depose both individuals, but chose to depose only the bank's representative, at which time he failed to ask many relevant questions. In addition, the bank submitted *in camera* to the district court copies of

the grand jury subpoenas and the responsive Coronado account records.

The district court entered final summary judgment for BankAtlantic on June 22, 1999, pursuant to the Annunzio Act because absolutely no bank records of Coronado were disclosed except pursuant to valid grand jury subpoenas. The district judge specifically found as indisputable fact (in his memorandum order adopted by the final judgment) that "BankAtlantic made all disclosures of possible violations of money laundering and bank fraud laws pursuant to valid grand jury subpoenas." The Eleventh Circuit affirmed on August 18, 2000, with an opinion that is appended to the petition before this Court.

REASONS FOR DENYING THE WRIT

A. Congress, Not The Eleventh Circuit, Has Declared That Banks Have Immunity From Civil Liability When Producing Account Records Pursuant To Grand Jury Subpoenas.

The Annunzio Act, which Congress enacted *after* the ECPA, provides the bank with full and complete immunity from any liability to Coronado. The text of the relevant section of the Act itself establishes this point:

> A. Any financial institution [and any director, officer, employee, or agent of such institution]
>
> B. that makes
>
> 1. a disclosure of any possible violation of law or regulation, or

2. a disclosure pursuant to this subsection, or

3. *[a disclosure pursuant to] any other authority*

C. shall not be liable to

1. any person

D. under

1. *any law* or regulation *of the United States*, or

2. any constitution, law, or regulation of any State or political subdivision thereof

E. for

1. such disclosure, or

2. any failure to notify

a. the person involved in the transaction, or

b. any other person of such disclosure.

31 U.S.C. § 5318(g)(3) (emphasis added).[1]

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[1] The precise language of this subsection of the Annunzio Act reads:

> Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution, shall not be liable to any person under any law or regulation of the United

Application of the express provisions of the Annunzio Act to the indisputable facts of this case is straightforward: (A) BankAtlantic (B) which made a disclosure of possible violations of money laundering and bank fraud laws and made all disclosures of account records pursuant to grand jury subpoenas (C) shall not be liable to Coronado or any of the other account holders in the alleged class (D) under the Electronic Communications Privacy Act upon which claims in Coronado's complaint are based (E) for its disclosures or its failure to notify Coronado or any of the other account holders in the purported class of those disclosures. Congress, not the Eleventh Circuit, created this immunity.

The Eleventh Circuit merely found that by virtue of the clear, express, and broad terms of the Annunzio Act, and in light of the objective this portion of the Act is intended to achieve (i.e., to encourage cooperation with money laundering investigations by protecting banks from civil liability where the government has and exercises the legal authority to demand disclosure of financial records), it is highly logical to determine that grand jury subpoenas fall within the meaning of "*any* other authority." The word "any" is very broad in scope and is not ambiguous. Moreover, a grand jury subpoena is not some inferior form of authority. As this Court has stated: "The institution of the grand jury is deeply rooted in Anglo-

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States or any constitution, law, or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

American history . . . In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or indictment of a Grand Jury.' " *United States v. Calandra,* 414 U.S. 338, 342-43, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1974).

This Court has elaborated at length on the investigatory power of grand juries by subpoena. *Id.* at 343-45. Grand juries are afforded great autonomy and latitude in their investigations: "It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *Id.* Grand juries are expected to dig deep: "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Id.* at 344.

This Court has also made a point having great significance in the present case: Witnesses before grand juries such as BankAtlantic are compelled to cooperate fully. *Id.* at 345. As the Court specifically stated, "a witness may not interfere with the course of the grand jury's inquiry. He 'is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his.' . . . Nor is he entitled 'to challenge the authority of the court or of the grand jury' or 'to set limits to the investigation that the grand jury may conduct.' " *Id.* at 345.

Without doubt, therefore, the grand jury subpoenas served on BankAtlantic must be considered "any other authority" within the meaning of the third safe harbor of the Annunzio Act. To hold otherwise would be to completely ignore the constitutional authority of grand juries as recognized by this Court. Such a holding would also defy common sense. As a result, the bank definitely has full immunity from all of Coronado's claims under the third safe harbor.[2]

Coronado, however, argues that Congress decided to exempt *only* records held in electronic storage for less than 180 days from the reach of grand jury subpoenas, leaving all other forms of bank records – including records in electronic storage for more than 180 days – within their reach. In making this argument, Coronado fails to point to any provision of the ECPA specifically stating that grand jury subpoenas do not apply to electronic communications less than 180 days old. Indeed, *nowhere* in the ECPA is there a provision stating that grand jury subpoenas cannot be used to obtain account information. Instead, Coronado narrowly focuses *solely* on 18 U.S.C. § 2703(a) and (c) of the ECPA. In essence, Coronado argues that this is the only applicable portion

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[2] All four of the federal banking regulators (the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision) have issued a joint, interagency statement observing that the most certain way for banks to completely protect themselves under the Annunzio Act is to either file a Suspicious Activity Report (SAR) *or ask to be served with a grand jury subpoena*. Federal Banking Law Reports, No. 1751 (April 17, 1998) (emphasis added).

of the ECPA regarding disclosure and that since grand jury subpoenas are not mentioned in this particular section, they cannot constitute "legal authority" under the ECPA and, by extension, under Annunzio. He is wrong.

In the first place, another section of the ECPA expressly states that good faith reliance on "a grand jury subpoena" (or "a legislative authorization, or a statutory authorization," which includes, of course, the Annunzio Act) is a "complete defense to any civil or criminal action" for violation of any of the electronic storage provisions of the ECPA. 18 U.S.C. § 2707(e); *see also* 18 U.S.C. § 2520(d) (same defense for interception of electronic communications). This necessarily means that grand jury subpoenas are "legal authority" under the ECPA. It is a fundamental principal of statutory construction that all parts of a statute (such as the ECPA) must be given effect and that all sections of the statute must be construed with reference to each other to produce a consistent and harmonious whole. As such, it is clear that the ECPA treats grand jury subpoenas as "legal authority," at least for purposes of a bank's immunity from civil liability for disclosure. The latter provision (Section 2707) expressly qualifies the former (Section 2703) and expressly provides a defensive role for grand jury subpoenas (and for other statutory enactments such as the Annunzio Act) in the working of the ECPA.

Moreover, it was *after* enactment of the ECPA that Congress passed the Annunzio Act specifically providing immunity from civil liability "under *any* law or regulation of the United States" (clearly including the ECPA) if disclosure is made pursuant to "*any* other authority." 31 U.S.C. § 5318(g)(3) (emphasis added). If there is to be any

statutory "trumping," it is the Annunzio Act over the ECPA and not the other way around. Furthermore, there is nothing in the Annunzio Act, or in any other statute, expressly prohibiting grand jury subpoenas from serving as "any other authority," thus rendering irrelevant Coronado's citation of *Gelbard v. United States*, 408 U.S. 41 (1972). In short, there is no basis in the ECPA or any other statute or federal law to argue, as Coronado does, that a grand jury subpoena is "not legal authority."

In addition to immunity under the Annunzio Act, the ECPA itself – as BankAtlantic explained to the district court in the motion for summary judgment – also expressly provides a "complete defense to any civil or criminal action brought under this chapter or any other law" when the defendant has made the disclosures in good faith reliance on, among other things, a grand jury subpoena. 18 U.S.C. § 2520(d); 18 U.S.C. § 2707(e). This is especially true where banks, as opposed to government agents, invoke the defense. *Organizacion JD LTDA. v. U.S. Department of Justice*, 18 F.3d 91, 94 (2d Cir. 1994), *cert. denied*, 512 U.S. 1207 (1994), *aff'd*, 124 F.3d 354 (2d Cir. 1997); *see Manufacturas International, LTDA v. Manufacturers Hanover Trust Co.*, 792 F. Supp. 180, 184 and 192-93 (E.D.N.Y. 1992), *aff'd*, 47 F.3d 1159 (2d Cir. 1995), *cert. denied*, 515 U.S. 1132 (1995).

To establish this complete defense, BankAtlantic need only demonstrate that it received facially valid grand jury subpoenas and made disclosures within the scope of those subpoenas. *Id.*; Sen. Rep. No. 99-541 (October 17, 1996), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3581. The bank has done this in the present case. By virtue of the express terms of the ECPA, therefore, even if the Annunzio Act

did not exist and even if BankAtlantic had in fact disclosed the contents of electronic communications regarding Coronado's account while in transmission or storage (which it did not because it did not have such equipment at the time), BankAtlantic has nonetheless established as a matter of law its good faith defense sufficient for summary judgment on the ECPA counts of Coronado's complaint. *See* Sen. Rep. No. 99-541 at 3581; *Davis v. Gracey*, 111 F.3d 1472, 1484 (10th Cir. 1997).

In sum, the ECPA did not preclude BankAtlantic from complying with the grand jury subpoenas served upon it to produce Coronado's account records.

B. Summary Judgment Was Properly Entered Upon The Evidence Presented.

The district court did not abuse its discretion by denying Coronado access to the grand jury subpoenas[3] and the collection of documents produced to the grand jury.[4] There are several reasons.

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[3] The multiple grand jury subpoenas demanded several different types of records about the accounts in the international division. The subpoenas sought specific types of information and sought information about certain specific accounts, which, presumably, is at least part of the reason the federal government insists on maintaining the secrecy of these subpoenas.

[4] It should be noted that BankAtlantic produced to Coronado in this case *all* of the documents regarding his account in the possession of the bank. What the bank has not done is to identify for Coronado the subset of those documents produced to him that were also produced to the government pursuant to the grand jury subpoenas.

First, Congress intentionally made secret the information in this particular case involving a criminal money laundering and bank fraud investigation. An express provision of the Annunzio Act prohibits notification to Coronado of the disclosures made by BankAtlantic to the grand jury. 31 U.S.C. § 5318(g)(2) ("A financial institution, and a director, officer, employee, or agent of any financial institution . . . that reports a suspicious transaction pursuant to . . . any other authority [which includes grand jury subpoenas] may not notify any person involved in the transaction that the transaction has been reported."). Moreover, the obstruction of criminal investigations statute makes it a criminal offense for bank officers to disclose the grand jury information involved in this case without authorization. 18 U.S.C. § 1509(b)(2).

Thus, Congress clearly intended the types of grand jury information in this case to remain secret at least during the course of a criminal investigation, which in this case was ongoing when the judge made his decision and which is still ongoing. Moreover, in this case the government specifically required BankAtlantic to maintain secrecy and refused to allow the bank to disclose the materials to Coronado. There is an excellent policy reason for this: If disclosure could be obtained merely by filing a lawsuit, it would be easy for anyone who might be a target of a grand jury investigation to simply file a civil lawsuit against someone and then use the civil discovery rules to completely undermine the confidential investigation of the grand jury.

Second, Coronado did not make a good faith attempt to explore available means for seeking the grand jury information despite a long-standing warning from BankAtlantic that he should do so. In essence, Coronado has waived his right to complain about the discovery ruling of the district court. As counsel for BankAtlantic wrote to counsel for Coronado a year and a half before entry of the summary judgment:

> Everything BankAtlantic produced was subject to subpoenas or warrants. In light of the [first] Eleventh Circuit decision in *Coronado* [also known as the *Lopez* case], it is clear that even the *Coronado* court would thus afford BankAtlantic the safe harbor protection of the Annunzio-Wylie Act. The only problems remaining for BankAtlantic are the hoops it must jump through in order to prove that its production of materials was only in response to subpoenas. In fact, we have no greater access to this material than you do. While we have the subpoenas, we cannot use them without a court order or authorization from the government. You cannot get them without a court order or authorization from the government.
>
> Since you are the plaintiff and bear the burden when signing pleadings to attest to the legitimacy of your complaint, we would suggest that during this period prior to the issuance of any mandate, you attempt to verify what I am telling you from government sources to avoid any further expense in this case.

Despite this information and warning, Coronado did not make any effort to bring the government into this matter

nor did he make any attempt to follow established procedures for seeking disclosure of secret grand jury information. Coronado should have sought, by request, by subpoena, or by some other means, to have involved the government and the district courts supervising the grand juries. *See* Rule 6 (especially subsections (e)(3)(C) and(D)) of the Criminal Rules of Procedure. Even after BankAtlantic served its motion for summary judgment appending the affidavit of the senior United States Customs Service agent in charge of the investigation, David White, Coronado still made no attempt to approach the government or even to depose Agent White about the grand jury information he still purports to seek.

Finally, the district court did not abuse its discretion when denying Coronado access to the grand jury subpoenas and to the collection of documents produced to the grand jury because the court reasonably and properly balanced the need for development of the facts relevant to the summary judgment motions with the need to maintain secrecy of the grand jury investigations. To accomplish this, the court took several steps.

(1) When evaluating the motions for summary judgment, the district court considered the lengthy and publicly-filed affidavits of both Frank Grieco and David White (the two key individuals involved in the investigation on behalf of the bank and the government respectively). Both of these individuals explained in detail the publicly available information about the investigation and swore in no uncertain terms that none of Coronado's account records or information was provided to anyone "except in strict compliance with, and within the scope of, valid and properly served grand jury subpoenas

issued pursuant to criminal investigations of money laundering and bank fraud."

(2) The court allowed Coronado an abundance of time (about 10 months after the bank filed its motion for summary judgment) to depose Frank Grieco and David White on their affidavits (although Coronado never even attempted to depose Agent White) and to conduct other relevant discovery as necessary.

(3) The court considered the deposition testimony of Frank Grieco because Coronado brought it to the court's attention. In his deposition, Mr. Grieco reaffirmed the statements in his affidavit, and he even elaborated on his assertion that none of Coronado's account information was provided to anyone except pursuant to grand jury subpoenas. Mr. Grieco explained in detail the steps actually taken by the bank to comply with the grand jury subpoenas:

> Q. Going back to paragraph nine [of your affidavit], the last line, it says, "In strict compliance. . . . " What steps were taken to comply with the Grand Jury subpoenas?
>
> A. We reviewed the Grand Jury subpoenas. We went through our documents within the bank and made sure that the only items that were provided were solely those items that were requested in the subpoena. Just in a general nature, the way the documents are kept, that required either cutting or blanking out information that would have related to other accounts.
>
> Q. Did you speak with anyone in relation to that compliance activity to give you guidance or instructions as to how to proceed?

A. I had discussions with counsel throughout.

Upon being asked a similar question later in the deposition, Mr. Grieco reiterated the steps taken by the bank:

> Q. How did you physically respond to the subpoena in order to gather the requested records?
>
> A. We got the subpoena. We went to the appropriate people to gather the documents that were requested.
>
> The documents were reviewed to ascertain that they were only information that was requested in the subpoena. Other information was either blanked out or cut out or what have you.
>
> That information for the subpoena was subsequently sent to our counsel, and through our counsel I believe they were also reviewed again and then subsequently sent to the appropriate government representatives.

The only matters to which Mr. Grieco refused to testify pursuant to the grand jury secrecy rules were the actual contents of the grand jury subpoenas and the specific nature of the information provided to the grand jury pursuant to those subpoenas.

(4) In addition, the district court reviewed *in camera* the grand jury subpoenas and the documents provided to the grand jury in response to those subpoenas to verify for itself the accuracy of the affidavits and deposition testimony presented to it. Because of the affidavits, the opportunity to depose, and the ability of the judge to verify with certainty the fundamental fact in this case, there was no "particularized need" for the trial court to

go beyond an *in camera* inspection and require disclosure of the grand jury materials to Coronado.

Coronado argues that the *in camera* inspection was improper. In making this argument, Coronado overlooks, among other things, circuit court case authority approving similar procedures. For example, in *Young v. United States*, 406 F.2d 960, 961 (D.C. Cir. 1969), the D.C. Circuit stated that *in camera* inspection by a trial judge of a witness's grand jury testimony to look for inconsistencies with his trial testimony, which would then be the only portion (if any) of the grand jury information reported to opposing counsel, was an appropriate method to maintain grand jury secrecy and yet satisfy the needs of the ongoing litigation. *See also In re Grand Jury Investigation*, 55 F.3d 350, 355-56 and n.3 (8th Cir. 1995); *In re Grand Jury Proceedings*, 654 F.2d 268 (3d Cir. 1981).

In the present case, the district court took every reasonable step to determine, and gave Coronado every reasonable opportunity to test, the accuracy of the assertions by both the bank's and the government's agents that "at no time did BankAtlantic provide federal agents with access to, or in any way disclose, any account documents, records, or financial information for Coronado's account, or any of the approximately 1,100 other accounts alleged in the complaint by Coronado, except in strict compliance with, and within the scope of, valid and properly served grand jury subpoenas issued pursuant to criminal investigations of money laundering and bank fraud." As such, the Annunzio Act provides BankAtlantic with complete

immunity from Coronado's claims, and summary judgment was properly entered in favor of the bank.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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